Supreme Court, U.S.
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No. 95-854

In The

# Supreme Court of the United States

October Term, 1995

LOWE'S MARKETS INC., dba
ST. HELENS SHOP N' KART,

*Petitioner,*

v.

KEN MACKILLOP, KATHY MORRIS, KEN GABRIEL, CARL WOJCIECHOWSKI, HAROLD CARLSON and ROBERT HEWETT, as Trustees for the Oregon Federation of Butchers Pension Trust, OREGON RETAIL EMPLOYEES PENSION TRUST FUND and PORTLAND AREA UFCW LOCAL 555 – EMPLOYERS HEALTH TRUST,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Should this Court grant certiorari to review the United States Ninth Circuit Court of Appeals' ruling that a collective bargaining agreement (CBA) determined by the National Labor Relations Board (NLRB) to be void *ab initio* under the National Labor Relations Act, as amended (NLRA), should nonetheless be enforceable under the Employees Retirement Income Security Act, as amended (ERISA)? Did the Ninth Circuit Court ruling below fail (1) to give deference to the NLRB's ruling; (2) to consider its decisions within the circuits itself; and (3) to consider this Court's preemption doctrine set forth in cases such as *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959)?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Lowe's Markets, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered on July 11, 1995, and the subsequent denial of the Petition for Rehearing and Suggestion for Rehearing En Banc on August 31, 1995.

## OPINIONS BELOW

The United States District for the District of Oregon denied the Petitioner's Motion to Stay Proceedings pending the decision of Gordon J. Myatt, Administrative Law Judge (ALJ) for the NLRB. An opinion was entered, prior to any decision from the NLRB, regarding the status of the collective-bargaining agreements ("CBAs"), on January 13, 1993. The decision specifically held that the NLRB's decision, even if the CBAs are void, is irrelevant to this action. (App. 57).

On February 24, 1993, ALJ Myatt filed a decision regarding the status of the CBAs. (App. 16). The NLRB affirmed the ALJ's decision, adding the footnote which stated that the CBAs were viewed as "never having legal effect". (App. 41).

On July 11, 1995, the Ninth Circuit Court of Appeals affirmed the District Court's decision, holding that the NLRB's reference to the status of the CBAs is a reference to the NLRA and that the liability of Lowe's is from ERISA. (App. 9). The Ninth Circuit Court of Appeals

denied the Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on August 31, 1995. (App. 61).

## JURISDICTION

This Court's jurisdiction to consider this petition from the final judgment or decree by the United States Court of Appeals for the Ninth Circuit is invoked pursuant to 29 U.S.C. § 1332.

## FEDERAL STATUTORY PROVISIONS

(a) National Labor Relations Act – 29 U.S.C. § 151 *et seq.*;

(b) ERISA – Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, *to the extent not inconsistent with law,* make such contributions in accordance with the terms and conditions of such plan or such agreement. 29 U.S.C. § 1145. (Emphasis added).

## STATEMENT OF THE CASE

On July 18, 1991, United Food and Commercial Workers, Local 555 ("Union") began picketing the petitioner, a small grocery store. On July 19, 1991, the Union's Chief Negotiator, Robert Patterson, stated that the sole purpose of the picketing "was to close Lowe's operation (Lowe's Market) down." (App. 20). Patterson informed

Lowe (the owner), that he would not negotiate with Lowe, and the Union's intention was to have a business impact so that it would close the store down. Patterson is an employee of Ken MacKillop, a named party to the action. MacKillop is not only a Trustee on the three Taft-Hartley Trusts, involved in this case, but is the President of the Union and the superior officer of the other Union Trustees who are also employed by the Union. Patterson's statement resulted in a trial before the NLRB; a false arrest suit; a wrongful discharge case; the two consolidated cases now before this Court; and a bankruptcy. These lawsuits are examples of the many attempts to drive Lowe's Market out of business.

The three Trusts were aware that a majority of the employees of Lowe's Market did not want to be members of the Union because employees stated on the petition (to recognize the Union) "unfair" and "union sucks." (App. 22). Employees were told by union representatives that, if they failed to join the Union and pay dues, they would not have jobs. Three of the Trustees that instigated this lawsuit and others are from the Union. For example, MacKillop, Trustee/Union President, knowing his employees (union representatives) were required to have an appointment, sent them to Lowe's Market without an appointment. They were arrested, then filed a lawsuit against Lowe's Market. Police reports indicated that the union representatives wanted to be arrested. They also filed an Unfair Labor Practice Charge ("ULP") against Lowe's Market.

Employee dissatisfactions with the Union, which insisted on CBAs requiring employees to pay union dues, resulted in ULPs being issued by the NLRB. When that

occurred, Lowe's Market ceased to make contributions to the three Trusts because the NLRB's General Counsel took the position that the CBAs were illegal. The CBAs were ultimately found to be void *ab initio* by the NLRB.

## REASONS FOR GRANTING THE WRIT

It is respectfully contended that the U.S. Court of Appeals for the Ninth Circuit has decided federal questions in a way that causes conflicts, not only between two federal statutes, and prior decisions of this Court, but also between applicable decisions within the Ninth Circuit itself.

The opinion of the United States Court of Appeals for the Ninth Circuit has specifically held that ERISA supercedes other relevant federal statutes, and fails to give deference to the rulings of the NLRB. The lower Court has specifically ruled that an ALJs [and by extension the NLRB's] decision is irrelevant to this action. (App. 57).

### A. Garmon

This Court has stated that "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, [the Board] armed with its specialized knowledge and cumulative experience . . . " *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242, 79 S.Ct. 773, 778 (1959). The lower Court has not given deference to the findings by the NLRB. Moreover, the lower Court also failed to follow decisions in its own Circuit, as discussed below.

The status of the CBA is an issue which the NLRB should have full power to rule upon and its ruling should have the full force and effect which this Court and Congress intended. Moreover, NLRA section 302(c)(B) requires that there be " . . . the detailed basis on which such payments (contributions to the three trust funds) are to be made is specified in a written agreement. . . . " 29 U.S.C. § 186(c)(B).

**B. Westlake Development**

The Ninth Circuit held that there are circumstances where the employer can unilaterally terminate a CBA and avoid liability for delinquent trust contributions. In *Laborers Health and Welfare Trust Fund for Northern Cal., et al. v. Westlake Development, et al.*, 1995 WL 237128 (9th Cir. April 25, 1995) there was one employee, thus the employer unilaterally terminated the CBA and ceased making trust contributions, i.e., the one-employee unit rule. See *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557, 565 (9th Cir. 1984).

In *Lowe's Markets*, the Court held that even where the employees took the affirmative steps necessary to invalidate the CBA, the employer is still obligated to pay contributions. The concern created by this decision is that the employer loses either way. If Lowe's Market does not pay, then it must wait for the court to decide whether or not it should have paid. If Lowe's Market takes the avenue of paying the contributions, the Trust Funds will not have to pay the improperly paid contributions back to the employer. And, it will make no difference whether or not

the employees received any benefits or whether or not they will be entitled to future benefits.

Further, the Ninth Circuit stated in *Lowe's Markets* the fact that the NLRB found the CBAs to be void *ab initio* was unpersuasive, because the liability to pay contributions "flows from section 515 of ERISA". *Lowe's Markets* at 8120. Yet the Court gave deference to the NLRA in *Westlake*, regarding the Board's ruling which holds that "the one-man unit rule applies in an 8(f) context. . . . Accordingly, we find that the [employer] did not violate Section 8(a)(5) and (1) by repudiating the contract . . . " *Westlake* at 3. The Court gave deference to the NLRB's long established rule that an Employer can withdraw recognition of a union, when there is only one man (employee) in the bargaining unit.

The Ninth Circuit's attempted reconciliation between *Westlake* and *Lowe's Markets* rests on a distinction without legal difference or significance. In *Westlake*, the Ninth Circuit held that an employer's lawful repudiation of its labor agreement (under the NLRA and NLRB rulings) rendered the agreement void *ab initio*, not merely voidable. The contract repudiation was supported by the NLRB's one employee unit rule and precluded *any lawful bargaining relationship under the NLRA*. Thus, in *Westlake*, the Ninth Circuit recognized the absence of an underlying lawful bargaining relationship *ab initio* as a defense to an ERISA action.

In *Lowe's Markets*, the NLRB, by specific ruling, held the parties' bargaining relationship was void *ab initio*. The Ninth Circuit distinguished *Westlake* on the basis of the

one employee unit rule. However, there is no legal significance between a bargaining relationship which is void *ab initio* pursuant to the NLRB's one employee unit rule or pursuant to any other basis on which the NLRB voids bargaining relationships.

It is difficult to reconcile how the lower Courts can give deference to the NLRB and the NLRA in one instance, but not another.

### C. *Sheet Metal Workers'*

In *Sheet Metal Workers' Int'l Ass'n v. West Coast Sheet Metal Co.*, 954 F.2d 1506 (9th Cir. 1992), the Court gave deference to the fact that the employees decertified the Union.

The Ninth Circuit stated in *Sheet Metal*, "Justice also persuades us that West Coast's obligations to the Trust Funds terminated with the decertification of the Union- . . . . West Coast has protected its employees' interests through a self-funded plan ever since decertification. It must not be required to make duplicative contributions that could impair its ability to maintain contributions to its self-funded plan, nor to contribute to a plan from which its employees can derive no benefit. The Trust Funds will incur no unfunded liability for want of West Coast's contributions. Current and future beneficiaries of the Trust Funds are not entitled to the benefit of a windfall at West Coast's expense."

In the lower Court's attempt to reconcile *Lowe's Markets* with *Sheet Metal*, the court failed to address the following:

a) The employees took the matter before the NLRB by filing a ULP. The employer, Lowe's Market, could not unilaterally file a petition before the NLRB to have the union decertified. It took the action of the employees.

b) The fact that the employer ceased to make contributions to the Trusts was based on the joint actions of the employees and the NLRB, i.e., a ULP and a complaint standing for the proposition that the union did not represent the employees.

Although, in *Westlake* and in *West Coast*, the Ninth Circuit gave deference to the NLRA, it did not do so in *Lowe's Markets*. In *Westlake*, the Ninth Circuit determined that the obligation to contribute to the Trust Funds was conditioned on a provision of the NLRA and that Westlake lawfully repudiated the CBA based on the single employee unit rule and because of NLRB policy.

Moreover, the Ninth Circuit also stated in *Westlake*, that the unilateral repudiation of the CBA in this one-employee unit situation was lawful. The CBA was void, not voidable. *Id.* The underlying consideration in that statement by the Ninth Circuit, is what creates the "void", rather than the "voidable" contract. It can only be for purposes of the NLRA. Just as in *Lowe's Markets*, the NLRB found that the CBA never had legal effect for purposes of the NLRA. The Ninth Circuit gave deference to the NLRA in one instance, but refused to do so in the other instance.

c) The Ninth Circuit failed to address the fact that UFCW Local 555 had to refund back dues to the employees in light of the NLRB decision.

d) The Court failed to address the fact that their decision creates a windfall for the Trusts and the damages are not liquidated damages, but in fact punitive in nature.

In *West Coast*, the Ninth Circuit stated that West Coast should not be required to make duplicative contributions that could impair its ability to maintain contributions to its self-funded plan, nor to contribute to a plan from which its employees can derive no benefit. The Trust Funds will incur no unfunded liability for want of West Coast's contributions. Current and future beneficiaries of the Trust Funds are not entitled to the benefit of a windfall at West Coast's expense.

e) The fact that there is no evidence of damage to the Trusts. The Trusts never produced any evidence showing that they provided any benefits for the contributions they believe they are entitled to, nor have they shown how they were damaged. These monies are simply a windfall to the Trusts. Moreover, they are punitive in nature. Equity and justice require that the Trusts not be able to collect these contributions for which the Trusts have never given any benefits to any employees of Lowe's Market.

f) The fact that the employees, by their own actions have chosen not to benefit from the Trusts.

## CONCLUSION

This Court should review this decision to determine, if a CBA is void *ab initio*, and is therefore "void" for purposes of all federal statutes. The power of Trusts to

collect contributions comes from the CBA. The NLRB ruled that the CBAs in the instant case were void *ab initio*, thus the trust funds have no power to collect any contributions from this Employer. The rulings of both lower courts have given this power to the trust funds. When under the NLRA, as amended, they have no power to do so because there is no valid legal CBA.

For all the reasons stated, Petitioner, Lowe's Market, Inc., prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

WILLIAM FREDRICK HOELSCHER
Counsel of Record
FRANK S. WESSON
CARLA A. ANDERSON

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| KEN MACKILLOP; KATHY MORRIS; KEN GABRIEL; CARL WOJCIECHOWSKI; HAROLD CARLSON, as Trustees for the Oregon Federation of Butchers Pension Trust; et al.,<br>*Plaintiffs-Appellees,*<br>v.<br>LOWE'S MARKET, INC., d/b/a St. Helens Shop N' Kart,<br>*Defendant-Appellant.* | No. 93-35541<br>D.C. No. CV-92-00713-MFM |

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

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|---|---|
| KEN MACKILLOP; KATHY MORRIS; DARREL COFFEY; CARL WOJCIECHOWSKI; ARTHUR DULEMBA; ROBERT HEWETT, as Trustees for the Oregon Federation of Butchers Pension Trust,<br>*Plaintiffs-Appellees,*<br>v.<br>LOWE'S MARKET, INC., an Oregon corporation, d/b/a St. Helens Shop N' Kart,<br>*Defendant-Appellant.* | No. 94-35102<br>D.C. No. CV-93-00650-JAR<br>OPINION |

Appeal from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding

Argued and Submitted
May 2, 1995 – Portland, Oregon

Filed July 11, 1995

Before: James R. Browning, Thomas M. Reavley,*
and William A. Norris, Circuit Judges.

Opinion by Judge Reavley

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## COUNSEL

Frank S. Wesson, Portland, Oregon, for the defendant-appellant.

Davis S. Barlow, Donaldson, Kiel & McKenzie, Seattle, Washington; Stephen H. Buckley, Carney, Buckley, Kasameyer & Hays, Portland, Oregon, for the plaintiffs-appellees.

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## OPINION

REAVLEY, Circuit Judge:

Lowe's Markets, Inc. (Lowe's) appeals a summary judgment in which the district court held it liable for pension and health care contributions to certain multi-employer benefit plans. We affirm.

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* Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

## BACKGROUND

Lowe's operates an Oregon grocery store. Union representatives for the United Food and Commercial Workers Local 555 began picketing the store in 1991. This had a negative effect on business, and Lowe's eventually signed two collective bargaining agreements (CBAs) in August of 1991. One CBA, a retail meatcutter agreement, required Lowe's to make contributions on behalf of its employees to the Oregon Federation of Butchers Pension Trust. The second CBA, a grocery, produce and deli agreement, required Lowe's to make contributions to the Oregon Retail Employees Pension Trust Fund. Both agreements also required Lowe's to make contributions to a multiemployer health plan, the Portland Area UFCW Local 555-Employers' Health Trust. These three fringe benefit plans (the Plans), are multiemployer benefit plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461.

In November of 1991, a Lowe's employee brought an unfair labor practices complaint before the National Labor Relations Board (NLRB). The complaint was against the union and Lowe's. Some of the employees had never wanted to join the union and claimed that they had been coerced by Lowe's and the union into approving union representation. They did not like having to pay dues and claimed that the union had told them they would not have jobs unless they paid dues and joined the union. After the complaint was filed, Lowe's stopped making payments to the Plans. It obtained its own health insurance to provide its employees with health benefits.

In February of 1993 an NLRB administrative law judge (ALJ) concluded that the CBAs were invalid because the union was selected as the exclusive representative of the employees at a time when it did not represent an uncoerced majority of the employees, in violation of various provisions of section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158. The ALJ recognized that "a union must represent an uncoerced majority in the appropriate unit and when the employer renders unlawful assistance in establishing the union's majority, recognition and acceptance thereof violates [the NLRA]." The ALJ concluded that Lowe's had improperly coerced the employees to join the union, and ordered Lowe's and the union "to cease and desist from giving effect to, or in any manner enforcing the [CBAs]." However, the order stated that "nothing shall require Respondent Lowe's to vary or alter any substantive feature or term of its relations with the unit employees which have been established by performance under the agreements, or prejudice any rights the employees may have acquired under the agreements." The order further required the posting of a notice to employees with similar language.

In August of 1993 the NLRB affirmed the ALJ's decision on administrative appeal, noting in a footnote that "[f]or purposes of the [National Labor Relations] Act, we view the collective-bargaining agreements as never having had legal effect." Lowe's places great emphasis on this language, as discussed below.

Beginning in June of 1992, the trustees of the Plans sued Lowe's for unpaid employer contributions to the Plans. The district court denied a motion to stay pending the NLRB proceeding, and eventually granted the

trustees' motion for summary judgment, entering money judgments for the amount of unpaid employer contributions to the Plans up to the date of the ALJ's ruling, together with interest and attorney's fees.

## DISCUSSION

### A. *Effect of the NLRB's Invalidation of the CBAs*

Lowe's argues that it has no obligation to the Plans by virtue of invalid collective bargaining agreements. The trustees argue that under ERISA Lowe's obligations remain even if the CBAs are invalid for not meeting the uncoerced majority requirement of the labor laws. The district court has awarded to the Plans those contributions due from Lowe's up to the date of the ALJ's ruling on February 24, 1993. We do not have before us any question of contributions due thereafter.

The key statute here is ERISA section 515, 29 U.S.C. § 1145, which was added to ERISA in 1980 and states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Several circuits including our own have analyzed this provision and its legislative history. They have concluded that in circumstances such as those presented here, section 515 mandates that employers are responsible for ERISA plan contributions regardless of defenses challenging the validity of the underlying CBA.

In *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 951, 93 L.Ed.2d 999 (1987), we explained:

> For reasons of public policy, traditional contract law does not apply with full force in actions brought under [ERISA] to collect delinquent trust fund contributions. In recognition of the fact that millions of workers depend upon employee benefit trust funds for their retirement security, Congress and the courts have acted to simplify trust fund collection actions by restricting the availability of contract defenses, which make collection actions unnecessarily cumbersome and costly.

*Id.* at 773 (citation omitted). We held that the defense of fraudulent inducement was not available in ERISA trust fund collection actions against employers. We drew a distinction between defenses which make an agreement voidable and those that render it void *ab initio*, and held that only the latter defenses, such as fraud in the execution, are available in such actions. *Id.* at 773-775.

In *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2d Cir. 1990), *cert. denied*, 498 U.S. 982 (1990), the Second Circuit affirmed a summary judgment in favor of the trustees of multiemployer pension plans suing an employer for unpaid contributions. The employer argued that it had no liability to the plans because no valid CBA existed. Specifically, the employer raised the defenses of lack of majority representation and abandonment of the CBA. The court rejected these defenses, concluding that the purpose of section 515 was "to insulate benefit plans from exactly these defenses." *Id.* at 313. The court reasoned that this section of ERISA severely limits defenses

the employer might raise to the underlying CBA when benefit plans sue to recover employer contributions. It relied on congressional intent that "benefit plans must be able to rely on the contribution promises of employers because plans must pay out to beneficiaries whether or not employers live up to their obligations. For this reason, Congress placed employee benefit plans in a position superior to the original promisee, analogous to a holder in due course." *Id.* at 314 (citation omitted). The court noted that the only valid defenses by an employer it could find were in cases where (1) the pension contributions themselves are illegal, or (2) the CBA is void rather than voidable. The example given of the latter exception is fraud in the execution, as where the employer was not even aware it was signing a CBA. *Id.* The court further found "unmistakably clear legislative intent" that one purpose of section 515 was to abolish the employer defense of lack of majority status. *Id.* at 316. It cited legislative history that section 515 was specifically aimed at overruling two "pre-hire agreement" cases. *Id.* In these cases,[1] an employer had signed a pre-hire agreement promising to abide by the terms of a CBA as soon as he hired his employees. The employers in these cases later escaped liability to benefit plans by arguing that the pre-hire agreements were invalid because the unions had failed to attain majority status.

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[1] *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980); *Western Washington Laborers-Employers Health & Security Trust Fund v. McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979).

The Eighth Circuit reached the same result in *Berry v. Garza*, 919 F.2d 87 (8th Cir. 1990). It held that because the employer "knowingly entered into a facially valid collective bargaining agreement with the Union, he is now estopped from raising the defense of lack of majority status to avoid his obligation to the [ERISA] Fund." *Id.* at 90.

The Third Circuit followed a similar approach in *Agathos v. Starlite Motel*, 977 F.2d 1500 (3d Cir. 1992). Plan trustees sued an employer for unpaid contributions. The employer argued that "the collective bargaining agreement was invalid because it was induced by a threat to picket and because the Union did not represent a majority of [employer's] employees at the time the agreement was executed." *Id.* at 1504. The court held that section 515 barred this defense, and that "the defense of lack of majority support for the union would not have been available to [employer] even prior to the enactment of section 515." *Id.* at 1506.

Further support for the Plans' position is found in *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc). That case did not involve the defense of lack of majority status, but in discussing the legislative history of section 515, it noted the congressional intent to overrule the pre-hire agreement cases discussed above. It found that "nothing in ERISA makes the obligation to contribute depend on the existence of a valid collective bargaining agreement; the repudiation of cases such as *McDowell* and *Overhead Doors* shows the opposite." *Id.* at 1153. Hence, the court concluded that if the employer simply points to a defect in the formation of the CBA "such as . . . lack of

majority support for the union . . . it must still keep its promise to the pension plans." *Id.*

We find compelling the reasoning of these cases, and therefore conclude that an employer's assertion that the CBA is invalid due to lack of majority status is not a defense in an action brought by an ERISA plan or its trustees to collect employer contributions. Indeed, we conclude that Congress intended to abolish this very defense with the passage of section 515.

Lowe's points to language in a footnote of the NLRB decision affirming the ALJ, which states that "[f]or purposes of the Act, we view the collective-bargaining agreements as never having had legal effect." Lowe's argues that this language proves that the CBAs were void *ab initio*. We are unpersuaded by this argument. First, the NLRB's reference to the "Act" is a reference to the NLRA. Lowe's liability here, however, flows from section 515 of ERISA, where the legislative purpose was to preclude CBA defenses from being used as a defense to the ERISA obligation of employers to fund multiemployer benefit plans. Second, while cases such as *Benson* and *Agathos* recognize that section 515 does not mandate employer contributions where the CBA is void *ab initio*,[2] they nevertheless hold that the very defense raised here, lack of majority status, is not a valid defense to the employer's obligation to an ERISA plan. Third, the NLRB decision makes clear, in the notice to employees it required Lowe's to post after the decision, that "[n]othing, however, shall require us to vary or abandon any wage, hour, seniority,

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[2] *See Benson*, 907 F.2d at 314; *Agathos*, 977 F.2d at 1505.

or other substantive feature of our relations with you which has been established in the performance of these agreements with the Union, nor will you be prejudiced in the assertion of any rights you may have under the agreements."

Three recent Ninth Circuit opinions bear on our analysis. In *Sheet Metal Workers' Int'l Ass'n v. West Coast Sheet Metal Co.*, 954 F.2d 1506 (9th Cir. 1992), we held that an employer's obligations to make contributions to employee benefit plans as provided in a CBA ceased when the employees of the union voted to decertify the union. In effect we granted relief prospectively from the date of the event which terminated the CBA. In contrast, the employer here, through unilateral conduct, simply ceased making contributions to the Plans upon the filing of the NLRB action. The Plan trustees only sought, and the district court only allowed in its judgments, contributions up to the date of the ALJ's ruling that the CBAs were unenforceable.

In *Carpenters Health & Welfare Trust Fund v. Bla-Delco Constr., Inc.*, 8 F.3d 1365 (9th Cir. 1993), ERISA benefit plans also sought unpaid contributions from an employer. The employer had entered into agreements with a union agreeing to be bound by a master collective bargaining agreement, and providing that either party could withdraw from the agreement upon giving notice. The employer and the union disputed whether proper notice had been given. We held that the CBA was not void but merely voidable upon the giving of proper notice, and that this defense did not apply in the action by the ERISA plans to recover benefits from the employer. We concluded that the employer "could have

pursued its dispute with the Union under the grievance and arbitration procedures of the CBA. . . . [T]he Trust Funds were not required to follow those procedures. It would contravene the policy to simplify and expedite trust fund collection actions to require the Trust Funds' in this case to litigate the termination dispute between [the employer] and the Union." *Id.* at 1369.

Most recently, in *Laborers Health and Welfare Trust Fund v. Westlake Dev. Co.*, No. 93-16584, 1995 WL 237128 (9th Cir. April 25, 1995), ERISA benefit plans again sought recovery of contributions from an employer. The employer had signed a pre-hire collective bargaining agreement under section 8(f) of the NLRA, 29 U.S.C. § 158(f). Section 8(f) covers certain pre-hire agreements in the building and construction industry. The employer's defense was that the agreement was unenforceable based on the " 'one-employee unit rule,' which provides that employers need not participate in collective bargaining if they have only a single employee who falls within the collective bargaining unit." *Id.* at *1. The employer had purported to unilaterally terminate the agreement based on this rule. We recognized that, as a matter of labor law, pre-hire collective bargaining agreements ordinarily cannot be terminated by the employer's unilateral repudiation of the agreement, but that the " 'unique circumstances of a single-employee bargaining unit in the construction industry' " made it appropriate to treat repudiation under the one-employee unit rule as " 'equivalent to a repudiation resulting from decertification of the bargaining representative.' " *Id.* at *3 (quoting *Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying Co.*, 746 F.2d 557, 565 (9th Cir. 1984) and district court). We held that

the exception to the general rule allowing unilateral repudiation of a CBA based on the one-employee unit situation meant that the repudiation was lawful and rendered the CBA void rather that [sic] voidable. We distinguished *Bla-Delco* on this basis. *Id.* at *5.

We believe that these cases can be reconciled with each other and with our decision today. Although *Rozay's Transfer* recognized that section 515 limited the availability of contract defenses in collection actions brought on behalf of ERISA benefit plans, it also recognized that "[f]or an employer to be obligated to make employee benefit contributions to a trust fund, there must exist a binding collective bargaining agreement." 791 F.2d at 773. The issue we face is when a binding collective bargaining agreement ceases to exist. *Sheet Metal Workers'* holds that the voluntary decertification of a union by its employees ends the collective bargaining agreement, and employer obligations to the ERISA plans cease upon that event. 954 F.2d at 1509. *Westlake* holds that, in the unique circumstance of a section 8(f) pre-hire collective bargaining agreement, an employer's unilateral repudiation of such agreement under the one-employee unit rule renders the agreement void, and the obligation to the ERISA benefit plan also ceases upon repudiation. 1995 WL 237128 at *5. As a general proposition, however, unilateral action of an employer will not render a CBA void and unenforceable, nor will the mere assertion by the employer that the union lacks majority status. *Sheet Metal Workers'*, for example, distinguished an "employer's after-the-fact attempt to extricate itself through unilateral action from trust fund obligations that it knowingly accepted," and noted that "[a]t the time the 1986 [CBA] was imposed,

[the employer] had no way of being certain that the union would lose its majority status." 954 F.2d at 1510. Where there are grievance and arbitration procedures under the CBA, as in *Bla-Delco*, the obligation to make contributions to the ERISA plans continues until those procedures are followed and the CBA is ruled to be terminated by the appropriate authority. *See Bla-Delco*, 8 F.3d at 1369. Similarly, in our case, where an NLRB action had been initiated to determine whether the CBA was invalid for lack of majority status, the employer's obligations to the Plans continued until the NLRB ruled that the CBA had no force and effect.

B. *Denial of Motion to Stay*

Lowe's argues that the district court erred in denying its motion to stay the federal suit pending resolution of the NLRB proceeding. Assuming that this argument is not moot, we review the denial of a motion to stay under the abuse of discretion standard. *Sheet Metal Workers Int'l Ass'n v. Jason Mfg., Inc.*, 900 F.2d 1392, 1400-01 (9th Cir. 1990). Based on the discussion above, Lowe's obligation to make Plan contributions remained regardless of the validity of the CBAs, up to the date of the NLRB's decision regarding such validity. Further, the NLRB could not have granted the relief requested in this suit, as such relief was not requested before the NLRB and the Plans were not even parties to the NLRB proceeding. In addition, the outcome in our case ultimately turns on ERISA, a statute that the NLRB has no unique expertise in interpreting so as to merit a stay by a federal district court. In these circumstances we find no abuse of discretion.

C. *Alternative Health Plan*

Lowe's makes one argument concerning the health Plan only. It points out that it began providing alternative health insurance coverage to its employees in January of 1992, after it ceased making contributions to the union's multiemployer health Plan. Lowe's argues that it would be unfair to require it to make retroactive contributions to the union multiemployer health plan after that date. The effect of the judgments below were to require contributions from the date that Lowe's stopped making payments to the health Plan to the date of the ALJ's decision in February of 1993.

We believe that the essential purpose of section 515 would be far too easily circumvented if an employer could unilaterally stop making contributions to an employee benefit plan as required by the CBA and the plan documents, and defend such action on grounds that it provided some form of substitute coverage for its own employees. For example, Benson teaches that "benefit plans must be able to rely on the contribution promises of employers because plans must pay out to beneficiaries whether or not employers live up to their obligations." 907 F.2d at 314. And *Gerber Truck* explains that "[p]lans rely on documents to determine the income they can expect to receive. . . . Once they promise a level of benefits to employees, they must pay even if the contributions they expected to receive do not materialize – perhaps because employers go broke, perhaps because they are deadbeats, perhaps because they have a defense to the formation of the contract. If some employers do not

pay, others must make up the difference in higher contributions, or the workers will receive less than was promised." 870 F.2d at 1151.

The situation might be different if the health Plan was derelict in its own obligations to provide benefits as required by the Plan documents, or otherwise failed to comply with ERISA. For example, in *Agathos*, the court found that the record suggested that "[the employer's] unreported employees failed to collect benefits not because they lacked meritorious claims or because they were dilatory in submitting their claims, but because the Funds persistently violated their 'watchdog' duties under ERISA to identify the employees and inform them of their participation in the plans. This circumstance militates against unconditionally requiring [the employer] to make contributions to the Funds." 977 F.2d at 1507. Lowe's, however, offered no summary judgment evidence that the health Plan failed in its own obligations to Lowe's employees.

AFFIRMED.

St. Helens, Oregon

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

LOWE'S MARKETS, INCORPORATED,
d/b/a ST. HELENS SHOP 'N KART

AND Case 36-CA-6713

EDNA S. TUNNELL, An Individual

UNITED FOOD & COMMERCIAL
WORKERS, LOCAL 555
(Lowe's Markets, Incorporated,
d/b/a St. Helens Shop 'n Kart

and Case 36-CB-1669

EDNA S. TUNNELL, An Individual

UNITED FOOD & COMMERCIAL
WORKERS, LOCAL 555

and Case 36-CP-154

LOWE'S MARKETS, INCORPORATED,
d/b/a ST. HELEN SHOP 'N KART

*Dale Cubbison, Atty.*, of Portland, Oregon,
for the General Counsel.
*Frank S. Wesson, Atty.*, of Portland, Oregon,
for Respondent St. Helens Shop 'N Kart.
*Gene Mechanic, Atty.*, of Portland, Oregon,
for Respondent United Food & Commercial
Workers Local 555.

Decision

**GORDON J. MYATT, Administrative Law Judge:** Upon charges filed in Case Nos. 36-CA-6713 and 32-CB-1669 by Edna Sue Tunnell, an individual, against Lowe's Markets, Inc., d/b/a St. Helens Shop 'N Kart (Lowe's) and United Food and Commercial Workers, Local 555 ("the Union") respectively, and a charge filed by Lowe's in Case No. 36-CP-154 against the Union, the Regional Director for Region 19 issued a an Order Consolidating Cases and a Second Amended Consolidated Complaint and Notice of Hearing on May 21, 1992. In substance, the consolidated complaint alleges that in July 1991,[1] Lowe's unlawfully recognized and assisted the Union as the collective bargaining representative of its employees in two separate units at a time when it knew the Union did not represent an uncoerced majority of the employees. Additionally, that as a result of this conduct, Lowe's and the Union entered into collective bargaining agreements covering these employee units. That the agreements, in turn, contained union security provisions requiring membership in good standing as a condition of employment, and dues checkoff provisions requiring Lowe's to withhold union dues from unit employees' wages and remit them to the Union. Further, that on March 17, 1992, the Union commenced picketing Lowe's facility where an object of the picketing was to force Lowe's to recognize and bargain with the Union as the representative of the employees, and that the picketing continued for a period of time exceeding 30 days. The

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[1] All dates herein refer to the year 1991 unless otherwise indicated.

consolidated complaint alleges that by engaging in the above conduct the Respondent Lowe's has violated Section 8(a)(1), (2) and (3) of the National Labor Relations Act ("the Act"), as amended. 29 U.S.C. § 151 *et seq.* Also, that the above conduct of the Respondent Union violated Section (8)(b)(1)(A), 8(b)(2), and 8(b)(7)(C) of the Act.

Both Respondents filed Answers to the consolidated complaint in which they admitted certain allegations, denied others, and specifically denied committing violations of the Act.

A hearing was held in this matter on June 18, 1992 in Portland, Oregon. All parties were represented by counsel and afforded fully opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. Counsel for the General Counsel gave oral argument at the conclusion of the hearing and briefs have been submitted by the Respondents. The oral argument and the briefs have been fully considered in arriving at this Decision.

Upon the entire record in this matter, I make the following:

## Findings of Fact

### I. Jurisdiction

Respondent Lowe's is an Oregon corporation with an office and place of business located in St. Helens, Oregon where it is engaged in the business of operating a food store. During the twelve-month period preceding the issuance of the complaint, Lowe's had gross sales in excess of $500,000 from its business operations. During

the same period, Lowe's purchased and caused to be delivered to its St. Helens facility goods and materials, valued in excess of $50,000, directly from sources outside the State of Oregon, or from suppliers within the state who in turn obtained such goods and materials directly from sources outside the State of Oregon. Accordingly, I find the Respondent Lowe's is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

## II. The Labor Organization Involved

The Union, United Food and Commercial Workers, Local 555, is a labor organization within the meaning of Section 2(5) of Act.

## III. The Alleged Unfair Labor Practices

In mid-July, the Union began picketing at Lowe's facility. The picket signs of the Union urged the public not to patronize Lowe's store and displayed the following legend:

> Notice to the Public
> Do Not Patronize
> Shop 'N Kart Does Not Deserve
> the Patronage of Hard-Working
> Consumers
> Please Do Not Patronize Shop 'N Kart

The undisputed testimony indicates that as a result of the picketing, Lowe's business and customer count began to drop substantially. At no time during the picketing had the Union attempted to organize Lowe's employees or to secure signed authorization cards from them. In an effort

to get the picketing to cease, Lowe's owner, Gene Lowe (Lowe), called Robert Patterson, the collective bargaining director of the Union. Patterson informed Lowe that he would not negotiated with Lowe, and the Union's intention was to have a "business impact" on Lowe's operation and close it down.

Harold Higgingbottom, Lowe's store manager, contacted Lowe's attorney, Frank Wesson, about the situation on July 19. Wesson, in turn, filed an representation petition (RM) with the Board's Sub-Regional Office and contacted Patterson about the picketing. Patterson reiterated that the Union's objective was to drive Lowe's out of business. At this point, Wesson indicated that Lowe's was willing to sign a standard area agreement with the Union. According to Wesson, Patterson stated that a contract could not be executed with Lowe's until the Union received a petition signed by the employees. The undisputed testimony reveals that Wesson asked for blank copies of the area agreement and Patterson agreed to supply them. Shortly thereafter, the Union delivered the agreements to Wesson's office.[2] Wesson testified that the contracts delivered by the Union were signed but undated. Patterson, on the other hand, testified that the agreements were unsigned at the time they were given to Wesson. According to Patterson, they were "samples" of

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[2] The Union supplied agreements covering two separate units of the employees. One was for the meat department employees and the other was for the grocery, produce and delicatessen employees.

the standard area contracts. Pursuant to a verbal arrangement with the Union, Lowe's withdrew the RM petition on July 26 and the Union ceased picketing.

On July 31, Lowe's held two meetings at its store with the employees on separate shifts during their working hours. At each meeting Lowe introduced Wesson to the employees and then left the meeting. Wesson testified that he advised the employees about his initial telephone conversation with Patterson concerning the picketing. Wesson acknowledged that he told the employees the Union wanted to put Lowe's out of business and if the picketing resumed and business decreased, employees would have to be laid off. He stated he further informed the employees that the Union was agreeable to signing a contract with Lowe's, provided the employees signed a petition requesting the Union represent them. According to Wesson, he told the employees the petition was necessary to back up the contracts. Wesson further stated he told the Employees that if they had any questions, they could contact the Board and he gave them the telephone number of the Sub-Region's office. Wesson testified he dictated the language for a petition to Dan Heroux, the produce manager,[3] at the latter's request during the first meeting and then left the meeting. At the end of the second meeting, Heroux returned the petition containing signatures of 18 employees. G.C. Exh. 5. The undisputed testimony indicates there was a total of 22 employees in the combined units.

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[3] Under the terms of the collective-bargaining-agreement, the produce manager was a member of the bargaining unit.

Employee Edna Tunnell, the Charging Party in Cases 36-CA-6713 and 36-CB-1669, testified that she attended the second meeting on July 31. According to Tunnell, Wesson told the employees to sign the petition requesting representation by the Union, and that the petition itself was circulated by the produce manager. Tunnell stated Wesson told the employees that if they did not sign the petition, the Union would continue picketing. She further stated that Wesson indicated Lowe's had signed, or would sign, a collective-bargaining agreement with the Union; although she could not recall which was the case with complete certainty. According to Tunnell, Wesson indicated Lowe's had done so, or would do so, to protect the employees. Tunnell asked why there were no representatives from the Union at the meeting. There is no indication in the record that she received a response to the inquiry. When the petition was circulated, Tunnell decided not to sign it.

Examination of the petition reveals that while it was signed by a number of the employees, several of them expressed unhappiness in doing so. In the margin to the left of his name, one employee noted, "unfair." Another placed the expression "union sucks" next to his name. G.C. Exh. 5, supra.

After receipt of the petition, Lowe made several changes in each of the bargaining agreements and executed them. Wesson forwarded the signed contracts and a copy of the petition to the Union on August 2. Patterson stated that when the agreements and the petition were received, the union officials determined that a majority of the employees in each unit signed the petition and the union president then executed the contracts on behalf of

the Union. Each of the agreements contained identical union security provisions requiring employees to become and remain members in good standing of the Union, and for the payment of dues. G.C. Exhs. 3 and 4.

On August 22, the Union held two separate meetings with the unit employees at the union hall. Tunnell attended the afternoon meeting, which she stated was conducted by several representatives of the Union. According to Tunnell, the union representatives discussed the wages and benefits contained in the contracts and passed out information about the union dues the employees had to pay. Tunnell stated the union representatives told the employees attending the meeting that if they failed to join the Union and pay dues, they would not have jobs.

Tunnell O'Brien, a business representative of the Union, testified that she was present at the afternoon meeting with employees. O'Brien confirmed the union representatives discussed the provisions of the contracts with the employees, and stated the employees were given applications to join the Union. While O'Brien denied the employees were told they had to join the Union, she admitted the applications for membership require them to pay dues 30 days after the contracts were signed or face the loss of their jobs. Former employee Susan Schwirse testified that she attended one of the meetings at the union hall. Similar to the testimony of O'Brien, Schwirse denied that any of the union representatives said the employees had to join the Union or lose their jobs.[4]

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[4] Schwirse was employed as a checker by Lowe's from March to September, 1991, and her surname was Smith at that

In early November, Tunnell circulated a petition among the employees stating the employees' rights had been denied and requesting an election regarding union representation. G.C. Exh. 2. there is testimony from several witnesses for the Union that Tunnell's circulation of the petition was not entirely voluntary on her part. James Pohrman, formerly the meat department manager,[5] testified that Lowe instructed Tunnell to circulate the petition requesting an election. According to Pohrman, Tunnell told him that she did not want to circulate the petition but that Lowe was "getting on the employees about the Union", and she was doing so to protect her job. Former employee Evelyn Early[6] stated that in late October or early November, Lowe told her it was stupid to pay union dues since she would never get the money back, and that he had broken the contract with the Union. Early further testified that she was given the anti-union petition by Tunnell shortly after these comments by Lowe and she signed it. Shauna Hawkins, a current employee, testified that she was called at home by Tunnell and asked to come to the store and sign the anti-union petition. According to Hawkins, when she arrived, she observed Lowe talking to Tunnell, who had the petition in her hand. Hawkins stated Lowe then left and she

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time. Upon the termination of her employment, the Union filed charges alleging she was discriminatorily discharged. These charges, however, were subsequently dismissed by the Regional Director, infra.

[5] Pohrman was hired by Lowe's in September, and discharged on November 27 for not properly performing his job.

[6] Early worked for Lowe's from October 1991 to April 1992, when she quit to join the union picketing of the store.

signed the petition because she was afraid she would lose her job. On November 14, Tunnell filed the charges against Lowe's and the Union in the "CA" and "CB" cases that are a part of this consolidated matter.

On February 25, 1992,[7] the Union filed three separate unfair labor practice charges against Lowe's. Two of the charges related to the alleged discrimination against Schwirse and another employee, Renee Schwappe, in violation of Sections 8(a)(1) and (3) of the Act. The other alleged, among other things, that Lowe's refused to comply with the terms and conditions of the collective-bargaining agreements (entered into on August 2, 1991) and sought to discourage employees from joining the Union in violation of Sections 8(a)(1), (3) and (5) of the Act. On March 17, the Union commenced picketing Lowe's facility and distributing handbills. The picket signs stated the Lowe's had committed unfair labor practices against its own employees. The handbills also indicated that Lowe's had committed unfair labor practices against its employees. (G.C. Exh. 8).

The three charges filed by the Union were dismissed by the Board's Regional office on April 30. Prior to that, however, the Union sent Lowe's attorney a letter on April 20, which purported to set out the purpose of the picketing. The letter disclaimed the picketing to be in support of the Union's Section 8(a)(5) charges – refusal to bargain with the representative of the employees – but, rather, that the picketing was in protest of the alleged unlawful

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[7] All dates hereafter refer to the year 1992 unless otherwise indicated.

conduct against the employees as cited in the charges. Resp. Exh. 1. The picketing ceased on April 30 when the charges were dismissed by the Regional Director, and the Union appealed the dismissal of all the charges to the General Counsel. On June 2, the Union withdrew the appeal of the 8(a)(5) portion of the charges and on June 12, the General Counsel sustained the dismissal of the balance of the charges.

## Concluding Findings

The threshold issue to be determined here is whether Lowe's granted recognition to the Union as the exclusive representative of its employees at a time when the Union did not represent an uncoerced majority of the employees in the two bargaining units. If this is found to be the situation, then the case law is clear that Lowe's and the Union have committed violations of the Act.

The seminal case, and indeed the only case cited by Counsel for the General Counsel in his oral argument, is **International Ladies Garment Workers' Union (Bernard Altman) v. NLRB,** 366 U.S. 731 (1961). There, the Supreme Court upheld the Board's finding that an employer violates Section 8(a)(2) and (1) and a union violates Section 8(b)(1)(A) of the Act, when the employer grants and the union accepts recognition at a time when the union does not represent a majority of the employees in an appropriate unit. From this holding evolved the well established principle that a union must represent an uncoerced majority in the appropriate unit and when the employer renders unlawful assistance in establishing the union's majority, recognition and acceptance thereof violates

8(a)(2) and (1) and 8(b)(1)(A) on the part of the employer and the union, respectively. **Mr. Glass Inc.,** 220 NLRB 104 (1975) (employer's conduct in assisting the union to obtain majority status held a violation); **Seaview Manor Home,** 222 NLRB 596 (1976) (co-owners' solicitation of signatures on authorization cards and union acceptance of recognition based thereon held a violation); **S.M.S. Automotive Products,** 282 NLRB 36 (1986); (unlawful poll by employer to establish majority and union's acceptance of recognition held a violation by both); **Brown Transport Corp.,** 296 NLRB 552 (1989) (employer's coercive conduct tainted authorization cards and union's acceptance of recognition thereafter violated the Act). See also **UPF Corp.,** 309 NLRB N. 135 (sl. op. December 11, 1992); **Human Development Assn.,** 293 NLRB 1228 (1989). In addition, when a collective-bargaining agreement, executed under these circumstances, contains union security and dues-deduction authorization provisions, the participating employer and union further violate 8(a)(1), (2), and (3) and 8(b)(1)(A) and 8(b)(2) of the Act, respectively. **A To Z Maintenance Corp.,** 309 NLRB No. 98 (sl. op. November 30, 1992); **Baby Watson Cheesecake,** 309 NLRB No. 65 (sl. op. November 9, 1992); **Human Development Assn.,** supra; **A.M.A. Leasing,** 283 NLRB 1017 (1987).

Applying the above principles to the instant case, I find the record evidence establishes that Lowe's did in fact recognize the Union at a time when the Union did not represent an uncoerced majority. Further, that upon acceptance of such recognition, the parties entered into collective-bargaining agreements which contained union-security and dues-deduction authorization provisions.

First, the uncontroverted evidence in the record clearly establishes that when the Union began the initial picketing of Lowe's business, it made no attempt to organize any of the employees. Rather, the Union's only stated purpose was to reduce the volume of Lowe's business – euphemistically described by the Union's attorney as "having an economic impact" on Lowe's business. Thus, when Lowe's offered to sign an area agreement with the Union, none of the employees were represented by the Union nor were they, at that point, seeking to have the Union represent them. In addition, it is apparent from the testimony that the employees were well aware that business was declining as a result of the picketing and could impact on their job tenure.

Viewing the meetings between Lowe's attorney and the employees on July 31 in this context, I find the statements made to the employees to induce them to sign the supporting petition for union representation were coercive. This is especially true since the picketing had stopped on July 26, by prior agreement between Lowe's and the Union, and Wesson informed the employees at the meetings that if the picketing resumed and business declined, there would have to be layoffs. I find it reasonable, in these circumstances, to infer that the threat of possible loss of employment tended to have as coercive an impact on the employees as a direct statement that they would be fired if a majority did not sign the petition supporting the Union. I do not deem it necessary to determine here whether the employees were told that Lowe's *had already signed* or *would sign* a contract with the Union. The threat of possible loss of employment is sufficient to taint the signatures on the petition.

In view of the above, I find that Lowe's violated Section 8(a)(1) and (2) of the Act by coercing employees to sign a petition requesting the Union represent them as their bargaining representative. I also find that the Union in accepting such recognition, at a time when it did not represent an uncoerced majority of the unit employees, violated Section 8(b)(1)(A) of the Act. It follows, therefore, that by executing collective-bargaining agreements containing union security and dues-deduction provisions, covering the two separate employee units, Lowe's further violated Section 8(a)(1), (2), and (3) and the Union further violated 8(b)(1)(A) and 8(b)(2) of the Act. See **A To Z Maintenance Corp.**, supra; **Baby Watson Cheesecake**, supra; **Human Development Assn.**, supra; **A.M.A. Leasing**, supra.

The sole remaining issue is whether the picketing by the Union, from March 17, 1992 to April 30, 1992, is determined to be for recognitional purposes and in violation of Section 8(b)(7)(C) of the Act. In the circumstances found here, I conclude that a violation has been established.

The record demonstrates that when the Union commenced picketing in March, it had filed three separate charges against Lowe's; two of which alleged discriminatory conduct against two employees; and one of which alleged discouraging membership in the Union and a refusal to bargain by not complying with the terms of the contracts. The Union asserts that both the legend on the picket signs and the information on the handbills, distributed during the picketing, preclude any inference that picketing was for recognitional purposes. Rather, the Union contends that the picketing was in protest of unfair

labor practices committed against the employees. To bolster this claim, the Union points to its letter of April 20, in which it advised Lowe's that it was not picketing to support the Section 8(a)(5) charges based on the alleged refusal to abide by the terms of the collective-bargaining agreements. I find these contentions of the Union are not sufficient to negate the fact that an object of the picketing was indeed for recognitional purposes.

First, in **Stage Employees IATSE Local 15 (Albatross Productions)**,[8] the Board reiterated the principle of **Blinne Construction**[9] that even if there are legitimate purposes for picketing by a union, the prescriptions of 8(b)(7) apply "if one of the union objects is recognitional." (Emphasis in original). Thus, even assuming the alleged violations of 8(a)(1) and (3) existed at the time of the picketing (which is not the case here since all of the Union's charges were dismissed by the Regional Director and his actions were upheld on appeal), the Union was also clearly pursuing its 8(a)(5) charges alleging Lowe's was not complying with the terms of the executed agreements. Inasmuch as the 8(a)(5) charges lacked merit because the Union did not represent an uncoerced majority of the employees at the time of recognition, the record fully demonstrates the picketing was also in support of the Union's recognitional and bargaining claim. **Food & Commercial Workers Local 23**, 283 NLRB 116 (1987). To

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[8] 275 NLRB 744-745 (1985) and the cases cited therein at n. 5.

[9] **Hod Carriers Local 840 (C.A. Blinne Construction)**, 135 NLRB 1153, 1167 (1962).

assert otherwise is to ignore the undisputed evidence in the record.

The picket signs and the union handbills stated Lowe's committed unfair labor practices against its own employees. Section 8(a)((5) charges carry a derivative violation of Section 8(a)(1) by interfering with the Section 7 rights of the employees to be represented by unions of their own choosing. In these circumstances, it is evident the picketing was in protest of *all* of the unfair labor practices alleged to have been committed by Lowe's. Nor does the disclaimer in the Union's letter of April 20 vitiate this fact. As noted in Lowe's brief, the picketing began March 17 and the purported disclaimer was nor [sic] until April 20 – some 34 days *after* the picketing started. Since no timely election petition was filed during the course of the picketing and no meritorious 8(a)(5) charge existed, it is clear that "Section 8(b)(7)(C) is applicable and a violation (of that section of the Act) has occurred." **Food & Commercial Workers Local 23,** supra.

In view of all of the above, I find and conclude that Lowe's and the Union violated Section 8(a)(1), (2), (3) and 8(b)(1)(A) and 8(b)(2) of the Act, respectively, when Lowe's granted and the Union accepted recognition as the bargaining representative of the unit employees, and when Lowe's and the Union executed collective-bargaining agreements containing union-security and dues-deduction authorization provisions.[10] I further find and conclude that the Union violated Section 8(b)(7)(C) of the

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[10] I note the record is barren of any evidence indicating the dues-deduction authorization provisions were implemented by Lowe's and payments made to the Union.

Act, when the Union picketed Lowe's from March 17, 1992 to April 30, 1992.

Conclusions of Law

1. Respondent, Lowe's Markets, Inc., d/b/a St. Helens Shop 'N Kart is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent United Food and Commercial Workers, Local 555 is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercing employees to sign a petition requesting the Union become their collective-bargaining representative and by granting recognition and executing collective-bargaining agreements with the Union, which contained union-security and dues-deduction authorization provisions, Respondent Lowe's has violated Section 8(a)(1), (2) and (3) of the Act.

4. By accepting recognition as the bargaining representative of Respondent Lowe's employees at a time when it did not represent an uncoerced majority of the unit employees, and by executing collective-bargaining agreements with Respondent Lowe's that contained union-security and dues-deduction authorization provisions, Respondent Union has violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

5. By picketing Lowe's from March 17, 1992 to April 30, 1992, where an object of such picketing was for recognitional and bargaining purposes and no timely election petition had been filed, the Respondent Union has violated Section 8(b)(7)(C) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## The Remedy

Having found that Respondent Lowe's and Respondent Union have engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (2), (3) and 8(a)(1)(A), 8(b)(2), and 8(b)(7)(C), respectively, of the Act, they shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent Lowe's shall be ordered to cease and desist from assisting the Respondent Union by threatening employees with loss of employment if a majority fail to request that the Respondent Union become their bargaining representative. Further, Respondent Lowe's shall be ordered to withdraw all recognition from the Respondent Union as the collective-bargaining representative of the unit employees, and the Respondent Union shall be ordered to cease and desist from acting as such representative.[11] The Respondents shall also be ordered to cease and desist from giving effect to, or in any manner enforcing the collective-bargaining agreements executed on August 2, 1991. However, nothing shall require Respondent Lowe's to vary or alter any substantive feature or term of its relations with the unit employees which have

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[11] Since there is no evidence in the record of implementation of the union-security and dues-deduction authorization provisions in the agreements, this matter is left to the compliance stage of these proceedings.

been established by performance under the agreements, or prejudice any rights the employees may have acquired under the agreements.

The Respondent Union shall be ordered not to picket, or cause picketing, at Lowe's where an object of such picketing is to force or require that employer to recognize or bargain with the Respondent Union as the collective-bargaining representative of its employees at a time when the Respondent Union is not certified as such representative, and where such picketing has been conducted without a petition under Section 9(c) of the Act being filed within a reasonable period of time not to exceed 30 days from the start of such picketing.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, I issue the following recommended:

## ORDER[12]

A. Respondent, Lowe's Markets, Inc., d/b/a St. Helens Shop 'N Kart its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Assisting or contributing support to United Food and Commercial Workers, Local 555, or any other

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[12] In no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

labor organization, by coercing employees to request the Union become their collective-bargaining representative.

(b) Assisting or contributing support to United Food and Commercial Workers, Local 555, or any other labor organization, by discriminating against employees to encourage membership in United Food and Commercial Workers, Local 555, or any other labor organization, and by granting recognition to and executing collective-bargaining agreements with the Union, which contain union-security and dues-deduction authorization provisions, at a time when the Union does not represent an uncoerced majority of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(d) Giving effect to, or in any manner enforcing the collective-bargaining agreements executed on August 2, 1991, unless and until the Respondent Union has been certified by the Board as the exclusive bargaining representative of the unit employees. Nothing, however, shall require Respondent Lowe's to vary or abandon any wage, hour, seniority or other substantive feature of its relations with the unit employees which has been established in the performance of the agreements with the Respondent Union, or prejudice the assertion by unit employees of any rights they may have under the agreements.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from United Food and Commercial Workers, Local 555 as the

exclusive bargaining representative of its employees for the purpose of collective bargaining, and cease to maintain or give effect the collective-bargaining agreements executed with the Union, unless and until that labor organization has been certified by the Board as the exclusive representative of the employees.

(b) Post at its facility in St. Helens, Oregon, copies of the attached notice marked "Appendix A."[13] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent Lowe's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply with its terms.

B. Respondent United Food and Commercial Workers, Local 555, its officers, agents, and representatives, shall:

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[13] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

1. Cease and desist from:

(a) Accepting recognition from Lowe's Markets, Inc., d/b/a St. Helens Shop 'N Kart as the bargaining representative of Lowe's employees at a time when the Respondent union does not represent an uncoerced majority of the employees in appropriate bargaining units.

(b) Acting as the exclusive collective-bargaining representative of Lowe's employees, unless and until the Respondent Union has been certified by the National Labor Relations Board as the exclusive representative of the employees in appropriate bargaining units.

(c) Giving any effect to the collective-bargaining agreements executed with Lowe's on August 2, 1991, or any extension, renewal, or modification thereof.

(d) Accepting any unlawful assistance or support from Lowe's in soliciting or acquiring union membership among Lowe's employees.

(e) Discriminating against or attempting to cause Lowe's to discriminate against the unit employees, in violation of Section 8(a)(3) of the Act, by maintaining or implementing the terms of the union-security and dues-deduction authorization provisions of the collective-bargaining agreements executed on August 2, 1991.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(g) Picketing, or cause picketing at the premises of Lowe's, where an object of such picketing is to force or require that employer to recognize or bargain with the

Respondent Union as the representative of its employees, at a time when the Respondent Union is not certified as such representative, and such picketing has been conducted without a petition filed under Section 9(c) of the Act within a reasonable period of time not to exceed 30 days from the start of such picketing.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at the Respondent Union's business offices and meeting places in St. Helens and Tigard, Oregon copies of the attached notice marked "Appendix B."[14] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent Union's authorized representative, shall be posted by it immediately upon receipt thereof and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to Regional Director for Region 19 sufficient copies of the notice for posting by the Lowe's, if willing, at all places where notices to employees are customarily posted.

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[14] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order what steps the Respondent Union has taken to comply with its terms.

Dated: February 24, 1993

/s/ Gordon J. Myatt
Gordon J. Myatt
Administrative Law Judge

[Appendices A And B Omitted In Printing]

Lowe's Markets, Inc. d/b/a St. Helens Shop 'N Kart *and* Edna S. Tunnell

United Food & Commercial Workers, Local 555 (Lowe's Markets, Inc. d/b/a St. Helens Shop 'N Kart) *and* Edna S. Tunnell

United Food & Commercial Workers, Local 555 *and* Lowe's Markets, Inc. d/b/a St. Helens Shop 'N Kart. Cases 36-CA-6713, 36-CB-1669, and 36-CP-154

DECISION AND ORDER
(Received Aug. 23, 1993)

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 24, 1993, Administrative Law Judge Gordon J. Myatt issued the attached decision. The Respondent Union, the Respondent Employer, and the General Counsel have filed exceptions with supporting briefs and the Respondent Union has filed an answering brief.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

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[1] On May 17, 1993, the Respondent Union filed a motion to include in the record a copy of a Federal court judgment in a matter involving some of the same parties. The respondent Employer opposed the motion. We accept the Respondent Union's submission and take administrative notice of the court's judgment.

[2] The Respondent Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

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preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd, 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's findings that the Respondent Employer violated Sec. 8(a)(1),(2), and (3), and the Respondent Union violated Sec. 8(b)(1)(A) and (2) of the Act by entering into collective-bargaining agreements that contained union-security and dues-deduction clauses when the Union did not represent an uncoerced majority of employees in the units. The General Counsel has excepted to the judge's apparently inadvertent failure to include in his remedy a provision requiring the Respondents to make employees whole for dues or other fees unlawfully coerced or withheld from employees. The Respondent Employer also has requested that we state clearly the status of the collective-bargaining agreement entered into by the Respondents.

We agree with the General Counsel that the Judge apparently inadvertently omitted the make-whole remedy from his Order and we correct the omission. The purpose behind the Board's routine remedy for similar violations of Secs. 8(a)(1) and (2) and 8(b)(1)(A) and (2) is to return the employees to the position they were in before the employer and the union entered into the illegal agreements. See, e.g., *Caro Bags, Inc.*, 285 NLRB 656 (1987); *Safeway Stores*, 276 NLRB 944 (1985). For purposes of the Act, we view the collective-bargaining agreements as never having had legal effect.

In adopting the judge's finding that the petition signed by 18 of 22 unit employees on July 31, 1991, and requesting union representation dues not demonstrate uncoerced majority support. Member Devaney relies particularly on the following facts in addition to those cited by the judge: (1) the Employer discussed the language of the petition at an employee meeting called by the Employer for the purpose of resolving the representation issue: and (2) the petition was returned to the Employer after it was signed by the employees, rather than to the Union.

orders that the Respondents, Lowe's Markets, Inc. d/b/a St. Helens Shop 'N Kart, St. Helens, Oregon, and United Food & Commercial Workers, Local 555, their officers, agents, successors, assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph A,2,(b) and reletter the subsequent paragraph.

"(b) Jointly and severally with the Union, reimburse all unit employees for any moneys required to be paid pursuant to the August 2, 1991 collective-bargaining agreements between it and the Union, together with interest to be computed as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987)."

2. Insert the following as paragraph B,2,(a) and reletter the subsequent paragraphs. "(a) Jointly and severally with the Employer, reimburse all unit employees for any moneys required to be paid pursuant to the August 2, 1991 collective-bargaining agreements between it and the Union, together with interest to be computed as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987)."

Dated, Washington, D.C. August 18, 1993

James M. Stephens, Chairman

Dennis M. Devaney, Member

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

Accordingly, we assure you that:

WE WILL NOT assist or contribute support to United Food & Commercial Workers, Local 555, or any other labor organization, by coercing you to request the Union to become your collective-bargaining representative.

WE WILL NOT assist or contribute support to United Food & Commercial Workers, Local 555, or any other labor organization, and discriminate against you to encourage your membership in United Food & Commercial Workers, Local 555, or any other labor organization, by granting recognition to and executing collective-bargaining agreements with the Union, which contain union-security and dues-deduction authorization provisions, at

a time when the Union does not represent an uncoerced majority of our employees.

WE WILL NOT give effect to, or in any manner enforcing the collective-bargaining agreements executed with United Food & Commercial Workers, Local 555 on August 2, 1991, unless and until that Union has been certified by the National Labor Relations Board as the exclusive bargaining representative of our employees. Nothing, however, shall require us to vary or abandon any wage, hour, seniority, or other substantive feature of our relations with you which has been established in the performance of these agreements with the Union, nor will you be prejudiced in the assertion of any rights you may have under the agreements.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from United Food & Commercial Workers, Local 555 as your representative for the purpose of collective bargaining, and cease to maintain or give effect the collective-bargaining agreements executed with the Union, unless and until that labor organization has been certified by the National Labor Relations Board as your exclusive collective-bargaining representative.

WE WILL jointly and severally with the Union, reimburse all unit employees for any moneys required to be paid pursuant to the August 2, 1991 collective-bargaining agreement between us and the Union, together with interest.

LOWE'S MARKETS, INC. D/B/A
ST. HELENS SHOP 'N KART

## APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT accept recognition from Lowe's Markets, Inc. d/b/a St. Helens Shop 'N Kart as the bargaining representative of Lowe's employees at a time when we do not represent an uncoerced majority of the employees in appropriate bargaining units.

WE WILL NOT act as the exclusive collective-bargaining representative of Lowe's employees, unless and until we have been certified by the National Labor Relations Board as the exclusive representative of Lowe's employees in appropriate bargaining units.

WE WILL NOT give any effect to the collective-bargaining agreements executed with Lowe's on August 2, 1991, or any extension, renewal, or modification thereof.

WE WILL NOT accept any unlawful assistance or support from Lowe's in soliciting or acquiring union membership among Lowe's employees.

WE WILL NOT discriminate against or attempt to cause Lowe's to discriminate against employees, in violation of Section 8(a)(3) of the Act, by maintaining or implementing the terms of the union-security and dues-deduction authorization provisions of the collective-bargaining agreements executed with Lowe's on August 2, 1991.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL NOT picket, or cause to be picketed, the premises of Lowe's, where an object of such picketing is to force or require that Employer to recognize or bargain with us as the representative of its employees, at a time when we are not certified as such representative, and such picketing has been conducted without a petition filed under Section 9(c) of the Act within a reasonable period of time not to exceed 30 days from the start of such picketing.

WE WILL jointly and severally with the Employer, reimburse all unit employees for any moneys required to be paid pursuant to our August 2, 1991 collective-bargaining agreement with the Employer, together with interest.

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 555

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

| | |
|---|---|
| LOWE'S MARKETS, INCORPORATED, d/b/a ST. HELENS SHOP 'N KART | CASES 36-CA-6713 36-CB-1669 36-CP-154 |
| and | |
| EDNA S. TUNNELL, An Individual | |
| UNITED FOOD & COMMERCIAL WORKERS, LOCAL 555 | JD(SF)-11-93 |
| (Lowe's Markets, Incorporated, d/b/a St. Helens Shop 'N Kart) | |
| and | |
| EDNA S. TUNNELL, An Individual | |
| UNITED FOOD & COMMERICAL WORKERS, LOCAL 555 | |
| and | |
| LOWE'S MARKETS, INCORPORATED, d/b/a ST. HELENS SHOP 'n KART | |

**ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD**

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law

Judge and the Decision of the said Administrative Law Judge, a copy which annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS HEREBY ORDERED, pursuant to Section 102.45 of National Labor Relations Board Rules and Regulations, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated. Washington, D.C., February 24, 1993

By direction of the Board:

JOHN C. TRUESDALE
Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the pages attached hereto. Note particularly the limitations on length of briefs and on size of paper, and that requests for extension of time must be served on the parties in the same or faster manner as used in filing the request with the Board.

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of The Executive Secretary, 1717 Pennsylvania Avenue N.W., Washington, D.C. 20570, on or before March 24, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KEN MACKILLOP, KATHY MORRIS, KEN GABRIEL, CARL WOJCIECHOWSKI, HAROLD CARLSON and ROBERT HEWETT, as Trustees for the Oregon Federation of Butchers Pension Trust,

Plaintiffs,

v.

LOWE'S MARKETS, INC., dba ST. HELENS SHOP N' KART,

Defendant,

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OREGON RETAIL EMPLOYEES PENSION TRUST FUND; and PORTLAND AREA UFCW LOCAL 555-EMPLOYERS' HEALTH TRUST,

Plaintiffs,

v.

LOWE'S MARKETS, INC., an Oregon corporation d/b/a ST. HELENS SHOP 'N KART,

Defendant.

Civil No.
92-713-MA
(Lead Case)
92-813-MA
Consolidated
Cases

OPINION

(Filed
Jan. 13, 1993)

Stephen H. Buckley
CARNEY, BUCKLEY, KASAMEYER & HAYS
Suite 410
1618 S.W. First Avenue
Portland, OR 97201

Attorneys for Plaintiff Trustees of the Oregon Federation of Butchers Pension Trust (the "OFBP Trustees")

David S. Barlow
DONALDSON, KIEL & McKENZIE, P.S.
Suite 1605
720 Olive Way
Seattle, WA 98101-1800

Attorneys for Plaintiffs Oregon Retail Employees Pension Trust Fund and Portland Area UFCW Local 555-Employers' Health Trust (the "Trust Funds")

Frank S. Wesson
Carla A. Anderson
4515 N. Channel Avenue
Portland, OR 97217

Attorneys for Defendant

MARSH, Judge.

These are a consolidated ERISA actions in which the plaintiffs allege that defendant has failed to pay its employee benefit contributions pursuant to the relevant collective bargaining agreements ("CBAs"). All the plaintiff [sic] move pursuant to Fed. R. Civ. P. 56 for summary judgment on the ground that defendant is liable for unpaid contributions pursuant to the CBAs as a matter of law. Additionally, plaintiff OFBP Trustees moves for summary judgment on damages. Defendant cross-moves for

summary judgment on the ground that it is not liable for contributions because the CBAs are void. For the reasons stated below, the OFBP Trustees' motion for summary judgment #17 is GRANTED, the Trust Funds' motion for summary judgment #37 is GRANTED, and defendant's cross-motion for summary judgment #33 is DENIED.

## BACKGROUND

On August 2, 1991, defendant entered into two collective bargaining agreements with United Foods and Commercial Workers Local 555 (the "Union"). The first agreement, a retail meatcutter agreement, requires defendant to make contributions to the Oregon Federation of Butchers Pension Trust and the Portland Area UFCW Local 555-Employers' Health Trust on behalf of its meat cutters and wrappers. The second agreement, a grocery, produce and deli agreement, requires defendant to make contributions to the Oregon Retail Employees Pension Trust Fund and Portland Area UFCW Local 555-Employers' Health Trust on behalf of its grocery, produce and deli employees. The parties agree that defendant has not made payments required under the agreements to any of these funds for the months December 1991 through September 1992.

Defendant claims that prior to entering into the agreements it was picketed by the Union. Defendant claims it was told by the Union that the picketing would only stop if defendant entered into the agreements and obtained the signatures of a majority of its employees on

a petition requesting representation by the Union. Defendant claims it complied with the union's demands in order to stop the picketing.

On November 13, 1991, Edna Tunnell, a store employee of defendant, filed charges with the National Labor Relations Board ("NLRB") alleging unfair practices by the Union and defendant. More specifically, Ms. Tunnell alleged that the Union violated 29 U.S.C. § 158(b)(1)(a) and (2), by threatening to have employees discharged if they did not join the Union and by accepting recognition at a time when it did not represent an uncoerced majority of the employer's employees. Ms. Tunnell alleged that defendant violated 29 U.S.C. § 158(a)(1), (2), and (3), by recognizing the Union at a time when it did not represent an uncoerced majority of the employees, and by entering an agreement which contained a union security clause at a time the union did not represent a majority of the employees.

The NLRB subsequently filed complaints against the Union and defendant based on Ms. Tunnell's allegations.[1] On June 18, 1992, a trial on the complaints was held before an Administrative Law Judge (the "ALJ") and a decision is now pending.

In light of the pending NRLB action, defendant stopped making contributions to the plaintiffs in December 1991. Instead, defendant obtained its own health insurance to provide its employees with health benefits.

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[1] The complaints do not state what relief is being sought. However, the administrative law judge can, pursuant to 29 U.S.C. § 160, void the collective bargaining agreements.

Defendant contends that if the ALJ determines that the agreements are void, the plaintiffs are not entitled to recover any delinquent contributions.

Prior to consolidation of these cases, defendant filed a motion to stay the action brought by the OFBP Trustees pending the ALJ's decision. Defendant argued that the ALJ's decision would determine whether or not the OFBP Trustees could recover any pension contributions.

On August 27, 1992, I denied defendant's motion for a stay. I determined that, under relevant case law, the voidability of the collective bargaining agreement is not a defense to an action to collect delinquent contributions. I also determined that even if the ALJ finds the union lacked majority status, this would render the collective bargaining agreement merely voidable, and not void *ab initio*. Thus, I determined that the ALJ's decision is irrelevant to this action.

## STANDARD

Summary judgment is appropriate if the court finds that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no genuine issue of material fact where the nonmoving party fails "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

All reasonable doubts as to the existence of genuine issues of fact must be resolved against the moving party.

*Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences can be drawn, summary judgment is inappropriate. *Sankovich v. Life Ins. Co.*, 638 F.2d 136, 140 (9th Cir. 1981).

In responding to a motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c). "If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Oltarzewski v. Ruggiero*, 830 F.2d 136, 138-139 (9th Cir. 1987).

## DISCUSSION

### 1. Defense of Lack of Majority Status

For reasons of public policy, contract law does not apply with full force in actions brought under ERISA to collect delinquent trust fund contributions. *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 773 (9th Cir. 1986). Congress and the courts have acted to simplify trust fund collection actions by restricting the availability of contract defenses. *Id.* Whether certain contract defenses are available in an action to recover delinquent trust fund contributions is a question of law. *Id.*

Courts have only recognized three defenses to claims for delinquent trust fund contributions: (1) that the pension contributions themselves are illegal, *see Kaiser Steel*

*Corp. v. Mullins*, 455 U.S. 72, 86-88 (1982)[2]; (2) that the collective bargaining agreement is void *ab initio*, and not merely voidable, *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 773-74 (9th Cir. 1986)[3]; and (3) that the collective bargaining agreement has become prospectively inoperative, and thereafter has no legal force or effect, *Sheet Metal Workers' v. West Coast Sheet Metal*, 954 F.2d 1506, 1509 (9th Cir. 1992).[4] *See also Agathos v. Starlite*

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[2] For example, in *Kaiser Steel*, the Supreme Court held that a coal producer, being sued on its promise to contribute to union welfare funds based on its purchases of coal from producers not under contract with the union, may raise a defense that the promise is illegal under antitrust and labor laws.

Defendant does not claim that it has such a defense here.

[3] In *Rozay's Transfer*, the Ninth Circuit held that an employer could raise the defense of fraud in the execution, but not fraud in the inducement, as a defense to its obligation to contribute to the trust fund. *Id.* at 773-74. The court based this distinction on analogizing pension fund trustees to third party bona fide purchasers or holders in due course of negotiable instruments. *Id.* at 774. The court noted that a defrauded party may recover property from a bona fide purchaser or avoid honoring a negotiable instrument held by a holder in due course only if the initial transaction was void *ab initio*, rather than merely voidable. *Id.* As a defense of fraud in the inducement makes a transaction merely voidable, it is not a legitimate defense to a trust fund's action to recover delinquent contributions. *Id.* at 775.

[4] In *Sheet Metal Workers*, the Ninth Circuit held that a Union's decertification is an additional defense by an employer to a claim for delinquent contributions. *Id.* at 1509. The court noted that a collective bargaining agreement becomes void prospectively upon a union's decertification, even if the agreement is for a term extending beyond the decertification. *Id.* Thus, where the collective bargaining agreement becomes prospectively inoperative or void, an employer need not

*Motel*, 977 F.2d 1500, 1505 (3rd Cir. 1992) (noting only the three recognized defenses listed above).

A case consistent with the void/voidable distinction made in *Rozay's Transfer*, and on point here, is *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2nd Cir. 1990). In *Benson*, the Second Circuit recognized the void/voidable distinction and then determined that the defenses of abandonment of contract and lack of majority status raised by an employer were not appropriate to a claim to recovery [sic] delinquent pension fund contributions. *Id.* at 314-16; *See also Berry v. Garza*, 919 F.2d 87 (8th Cir. 1990) (holding that an employer was estopped from raising the defense of lack of majority status to avoid its obligations to employee trust funds).

Notably, in *Sheet Metal Workers'*, though the Ninth Circuit expanded the defenses available to claims for delinquent contributions, it explicitly distinguished numerous previous decisions in this area which rejected certain other defenses. *Sheet Metal Workers'*, 954 F.2d at 1509-10. Specifically, the court distinguished the decisions rendered in *Rozay's Transfer, Benson* and *Berry*. *Id.* at 1509-10. Thus, the restrictions placed on contract defenses in those cases are valid.

In the present case, Tunnell's NLRB claims attack the validity of the collective bargaining agreement solely on grounds that the union lacked majority status when it entered into the agreement. Under *Benson* and *Berry*, lack of majority status is not a defense an employer can raise

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continue making contributions to the trust fund established by the agreement. *Id.* at 1510.

to an ERISA claim for delinquent trust funds because such a defense renders the collective bargaining agreement merely voidable. Thus, the NLRB's determination of Tunnell's claims, even if rendering the collective bargaining agreement prospectively void, is irrelevant to plaintiffs' claims for past delinquent contributions.

Defendant raises for the first time the defense that it is not an "Employer" as defined in the first agreement because the agreement defines an "Employer" as one "who is bound by a collective bargaining agreement with the union." Defendant contends that since the union lacked majority status, it is not bound by the collective bargaining agreement, and thus, not an "Employer" under the agreement. As this is simply a different way of phrasing the lack of majority status defense rejected above, I find that it fails for the same reasons.

2. Alternative Benefits Defense

Defendant raises yet another defense for the first time contending that since it provided alternative health insurance for its employees, plaintiffs should not be allowed to recover delinquent contributions because such would impose an undue hardship on defendant and result in a windfall for plaintiffs. In support, defendant cites two cases. *Manhattan Eye, Ear and Throat Hospital v. NLRB*, 942 F.2d 151 (2nd Cir. 1991); *Turnbull Enterprises, Inc.*, 259 NLRB No. 122 (1982). However, both of these decisions involve the NLRB's authority to remedy violations of § 8(a)(5) of the Labor Management Relations Act, 29 U.S.C. § 158(a)(5). As such, they are inapplicable here.

Instead, the Ninth Circuit has held that an employer's provision of an alternative equivalent is not a defense to an employer's obligation to make contributions to Trust Funds pursuant to a collective bargaining agreement. *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 761 (9th Cir. 1981); *see also Brogan v. Swanson Printing Co.*, 682 F.2d 807, 809 (9th Cir. 1982). Accordingly, defendant's alternative benefits defense also fails, and plaintiffs are entitled to summary judgment on the issue of liability.

3. Damages

In an action by a trustee or trust fund to recover delinquent contributions in which a judgment in favor of the plan is awarded, the court shall award the plan: (1) the unpaid contributions; (2) interest on the unpaid contributions; (3) an amount equal to the greater of the interest on the unpaid contributions or liquidated damages provided for under the plan in an amount not in excess of 20 percent of the unpaid contributions; (4) reasonable attorney's fees and costs; and (5) such other relief as the court deems appropriate. 29 U.S.C. § 1132(g)(2) (1992).

Here the OFBP Trustees have provided evidence that through September 1992, defendant owes $5,284.94 in pension contributions under the first agreement. The interest owing on this amount is $219.79. The Butchers Pension Trust also provides for the recovery of liquidated damages at a rate of 20 percent of the unpaid contributions, or $1,057.02 in this case. As these damages are undisputed, I find that plaintiff OFBP Trustees is entitled to recover these amounts from defendant.

The Trust Funds have not presented any evidence of damages at this stage. Accordingly, the Trust Funds shall file a brief on the issue of damages within 20 days from the date of this order. Defendant may respond and the Trust Funds may file a reply in accord with the normal deadlines. If any issues exist in regard to the Trust Funds' damages which required an evidentiary hearing, the parties shall so inform the court in their briefs.

The OFBP Trustees seek also to recover reasonable attorney fees. As the Trust Funds may also make a similar request after the entry of judgment, I will reserve ruling on the OFBP Trustees' request until that time. The OFBP Trustees may reraise the attorney fees issue by filing a petition for such after entry of judgment. The petition does not have to reassert any evidence or arguments raised here in the OFBP Trustees' motion, but may simply refer back to this motion.

4. Defendant's Motions Challenging Testimony

Defendant has filed two motions challenging affidavit testimony submitted in relation to the plaintiffs' motions for summary judgment. As I did not consider any of the challenged testimony in determining to grant the plaintiffs' motions, defendant's motions of objection to challenge testimony #30 and #32 are MOOT.

## CONCLUSION

Based on the foregoing, the OFBP Trustees' motion for summary judgment #17 is GRANTED, the Trust Funds' motion for summary judgment #37 is GRANTED,

and defendant's cross-motion for summary judgment #33 is DENIED. Plaintiff OFBP Trustees is entitled to recover from defendant, $5,284.94 in unpaid pension contributions, $219.79 in interest, and $1,057.02 in liquidated damages. Defendant's motions of objections to challenge testimony #30 and #32 are MOOT.

DATED this 13 day of January, 1993.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEN MACKILLOP; KATHY MORRIS, KEN GABRIEL; CARL WOJCIECHOWSKI; HAROLD CARLSON, as Trustees for the Oregon Federation of Butchers Pension Trust; et al.,

Plaintiffs-Appellees,

v.

LOWE'S MARKET, INC., dba St. Helens Shop 'N Kart,

Defendant-Appellant.

No. 93-35541

D.C. No. CV-92-00713-MFM

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KEN MACKILLOP; KATHY MORRIS, DARREL COFFEY; CARL WOJCIECHOWSKI; ARTHUR DULEMBA; ROBERT HEWETT, as Trustees for the Oregon Federation of Butchers Pension Trust,

Plaintiffs-Appellees.

v.

LOWE'S MARKET, INC., and Oregon corporation, d/b/a St. Helens Shop 'N Kart,

Defendant-Appellant.

No. 94-35102

D.C. No. CV-93-00650-JAR

ORDER

(Filed Aug. 31, 1995)

Before: BROWNING, REAVLEY*, and NORRIS, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.